IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1946

No. 790

R. R. DONNELLEY & SONS COMPANY,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in a review proceeding brought by the petitioner under Section 10 (f) of the National Labor Relations Act (herein sometimes called the "Act") to set aside an order of the National Labor Relations Board (herein called the "Board") entered February 17, 1945, in a case described on the Board's docket as No. 13-C-2032, *In the Matter of R. R. Donnelley & Sons Company and Organization Committee, Chicago Printing Trades Unions.* In said review proceeding the Board petitioned the court for the enforcement of said order, and the decree here

involved was entered pursuant to the Board's petition. Said decree (R. App. 576–577)* requires petitioner to:

1. Cease and desist from:

(a) Discouraging membership in Organization Committee, Chicago Printing Trades Union, or in any member thereof, or in any other labor organization, by demoting any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) (i) Questioning and haranguing its employees concerning their union affiliations and activities, (ii) maintaining a system of reports on union activities in the plant, and (iii) instructing foremen and supervisors to make statements to their employees concerning labor organizations which transgress the provision of the Act;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act; and

2. Take the following affirmative action:

(a) Offer Walter West reinstatement to the position from which he was discriminatorily demoted;

(b) Make Walter West whole for any loss of pay he has suffered by reason of his discriminatory demotion;

(c) Post a notice to employees stating that it will refrain from action and take action as required by the decree;

(d) Notify the Regional Director within ten days what steps petitioner has taken to comply with the decree.

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*In the court below, pursuant to the rules of that court, portions of the record, including evidence taken before the Board, were printed by petitioner and bound as a separate volume designated "Appendix to Petitioner's Brief." Other portions of the evidence taken before the Board were printed by the respondent and bound as a separate volume designated "Appendix to Respondent's Brief." The Clerk of this Court has had printed and bound as a part of the appendix to respondent's brief a record of the proceedings in the court below. References to the appendix to petitioner's brief are herein designated as (P. App.) and references to the appendix to respondent's brief are herein designated as (R. App.).

Decision and Opinion Below.

The Board's decision and order are reported in 60 N. L. R. B. 635. The opinion of the Circuit Court of Appeals is not as yet officially reported but is set forth in respondent's appendix at pages 532 to 542.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered September 11, 1946 (R. App. 575–579). By order entered on December 10, 1946, by Mr. Justice Murphy, the time for filing this petition was extended to December 18, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sections 10 (e) and (f) of the National Labor Relations Act.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A. § 151 *et seq.*) are set forth in the appendix to this petition, *infra*, pages 41–42.

Summary Statement of Matters Involved.

Petitioner is an Illinois corporation which has its offices and principal place of business at Chicago. It is engaged in the manufacture, processing, distribution and sale of printed matter. It operates branch plants at Crawfordsville, Indiana, and Detroit, Michigan, but only the Chicago plant is involved in this proceeding. At its Chicago plant it employs in excess of 4600 persons (P. App. 976–977).

The complaint of the Board, dated September 25, 1943, alleged that petitioner had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. With respect to the unfair labor practices, the complaint, as amended from time to time in the course of the hearing (P. App. 64–68), alleged in sub-

stance (P. App. 975): (1) That petitioner had questioned its employees regarding their union affiliation and activities; had advised and warned them to refrain from union affiliation; by written and oral communications had sought to discourage and prevent them from engaging in union activities; had made disparaging and derogatory statements to them concerning the Union and its leadership and warned them that they would gain no advantages through union affiliation but would lose certain existing benefits; had promulgated a rule prohibiting union activity on Company time and property; had demoted, laid off, refused to hire and otherwise discriminated against individuals because of their union affiliation and activities, by the foregoing and other similar conduct had interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act; (2) that petitioner had demoted Walter West because he had designated the Union his bargaining representative and had engaged in concerted activities with his fellow employees for the purpose of collective bargaining and other mutual aid and protection; had demoted Samuel Gates and, later, caused the termination of his employment because Gates had expressed sympathy with labor organizations and had engaged in concerted activities with fellow employees for the purpose of collective bargaining and other mutual aid and protection; by the foregoing conduct had violated Section 8 (3) of the Act.

The Board held that petitioner had interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (P. App. 56) by means of the activities of foremen authorized or ratified by petitioner (P. App. 53–54), by means of a system of reports on union activities in the plant (P. App. 54) and by means of written and oral statements made to employees (P. App. 55), and that it had discriminatorily demoted Walter West for union activity (P. App. 61).

On the other hand, the Board held that petitioner's treatment of Gates did not constitute discrimination (P. App. 61),

that petitioner had not engaged in unfair labor practices in pursuing its hiring policy (P. App. 50, 1040) and in posting and administering its union activity rule (P. App. 60), and that evidence introduced by the Board and the Union for the purpose of showing that petitioner, on various occasions extending from 1931 to 1943, had discriminatorily refused to hire ten certain persons and had been guilty of various discriminatory treatment of five certain employees (P. App. 1041–1043, 1047, 1051, 1054, 1056, 1058), was not in any case sufficient to show any discrimination (P. App. 50, 57–58, 1042–1043, 1050, 1056, 1059).

The action of the Board was sustained by a majority of the court below, Judge Briggle dissenting without opinion (R. App. 532–542).

In its opinion the court below stated that petitioner had been opposed to unions and had followed a non-union closed shop policy until 1933 when petitioner signed the Code and operated under the National Industrial Recovery Act, at which time it let its employees know it had not changed its attitude toward unions but that it was "only complying with the law"; that petitioner was opposed to the passage of the National Labor Relations Act and said so, and that after this Court had held the Act constitutional, it had represented the Act to its employees as a rather innocuous bit of legislation and of scant utility to them (R. App. 532–533). The court below then held that "with this long, consistent, persistent background of antagonism to unions,"

> (1) the petitioner had continued to argue and plead with its employees against unionization, which conduct was clearly an interference with their rights under Section 7 of the Act (R. App. 533);
>
> (2) the petitioner's statements went beyond mere talk and argument and constituted threats and attempts to intimidate its employees (R. App. 534);
>
> (3) the petitioner maintained a vigilant surveillance of its employees' union activity and let it be known to its

employees that they were being watched, and that such surveillance was calculated to and did intimidate its employees (R. App. 538);

(4) the petitioner sent its foremen out on missions of anti-unionism and could not be heard to say that, because the foremen, being themselves employees entitled to the privileges of the Act and so having the right to do and say what they did and said, the petitioner was not responsible for their conduct (R. App. 538);

(5) although petitioner had a perfect right to demote Walter West for violating a no-smoking rule, the Board's finding that he was demoted for union activity was supported by substantial evidence and could not be questioned (R. App. 541).

The enforcement decree entered by the court below followed verbatim the order of the Board (R. App. 576–579).

Questions Presented.

The questions presented are whether the order of the Board is supported by substantial evidence and is within the Board's power. One or both of these questions arises as to each clause of the decree. Stated in summary form, the clauses are (R. App. 576–577):

A. That petitioner cease and desist from:

(1) Discouraging membership in the Chicago Printing Trades Unions by demoting employees or otherwise discriminating in regard to employment;

(2) Questioning and haranguing its employees concerning their union affiliations and activities;

(3) Maintaining a system of reports on union activities in the plant;

(4) Instructing foremen and supervisors to make statements to employees concerning labor organizations which transgress the provisions of the Act;

(5) Otherwise interfering with employees in the exercise of the rights guaranteed in Section 7.

B. That petitioner offer Walter West reinstatement and make him whole by payment of back pay.

Clause A (1) and clause B relate to discrimination in violation of Section 8 (3), clause B applying to Walter West in particular and clause A (1) prohibiting that type of unfair labor practice in the future. As the West case was the only instance of discriminatory treatment found against petitioner, the general prohibition cannot stand unless the decree as to West stands. *Labor Board* v. *Express Pub. Co.*, 312 U.S. 426, 436-437. The question under these two clauses thus becomes, is the finding that West was demoted for union activity supported by substantial evidence?

Clause A (2) prohibits the questioning and haranguing of employees. The thing forbidden here is mere speech and the question presented is whether what petitioner said overstepped the bounds of its constitutional right. This is largely a legal question since the principal statements concerned were admittedly made.

Clause A (3) raises two questions, namely, whether there was substantial evidence to support the Board's finding that petitioner maintained a system of reports and, if so, whether petitioner's conduct in that respect was lawful.

Clause A (4) raises three questions. The first is whether the clause is in proper form and enforceable since in commanding petitioner to cease instructing foremen and supervisors to make statements to employees concerning labor organizations "which transgress the provision of the Act," it merely commands the petitioner not to disobey the law and says no more than the statute itself says. If the clause is in proper form, the question then arises as to whether it has substantial support in the evidence. On this question, separate consideration must be given to the clause as applied to foremen and as applied to supervisors above that rank. The Board held that the foremen were employees within the meaning of the Act and entitled to exercise

all of the rights guaranteed by Section 7, including the right to express opinions on the subject of unionization. It found, however, that petitioner encouraged, authorized, or ratified the activities of the foremen in that connection and so became responsible for their statements (P. App. 54). The question therefore is raised as to whether there is substantial evidence to support such finding. Since the activities of its supervisory employees above the rank of foreman are imputed to petitioner as a matter of law, the question with respect to them is whether their statements exceeded the bounds of petitioner's constitutional right of free speech. This is the same question as is presented by clause A (2) of the order.

Clause A (5) requires petitioner to cease and desist from otherwise interfering with employees. Being general in its terms, it can stand only if some of the clauses involving specific forms of interference are upheld. *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 436-437. It therefore raises no additional questions.

To summarize them in condensed form, the questions presented are:

1. Was there substantial evidence to support that part of the order requiring petitioner to cease from questioning and haranguing its employees concerning their union affiliations and activities?

This is primarily a question as to whether what petitioner said to its employees overstepped its constitutional right of free speech. This, in turn, involves the question as to whether its utterances were *per se* coercive, and, if not, whether they were a part of a coercive course of conduct.

2. Was there substantial evidence to support the clause of the order requiring petitioner to cease from instructing its foremen and supervisors to make statements to its employees concerning labor organizations which transgress the provision of the Act?

3. Is the clause of the order commanding petitioner to cease from instructing its foremen and supervisors to make statements to its employees concerning labor organizations that transgress the provision of the Act void for uncertainty?

4. Was there substantial evidence to support the clause of the order requiring petitioner to cease from maintaining a system of reports on union activity in the plant?

5. Was there substantial evidence to support the clause of the decree requiring petitioner to reinstate Walter West with back pay?

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In decreeing the enforcement of the order of the Board or any part thereof.

2. In finding that the order of the Board or any part thereof was supported by substantial evidence.

3. In decreeing that petitioner cease and desist from discouraging membership in the Chicago Printing Trades Unions, or other labor organizations, by demoting employees or otherwise discriminating in regard to their employment, and in holding that there was substantial evidence to support such provision in the order.

4. In decreeing that petitioner cease and desist from questioning and haranguing its employees concerning their union affiliations or activities and in holding that there was substantial evidence to support such provision in the order.

5. In decreeing that petitioner cease and desist from maintaining a system of reports on union activities in its plant and in holding that there was substantial evidence to support such provision in the order.

6. In decreeing that petitioner cease and desist from instructing foremen and supervisors to make statements to its employees concerning labor organizations which transgress the provisions of the Act and in holding that there was substantial evidence to support such provision in the order and that it was valid in form.

7. In decreeing that petitioner cease and desist from otherwise interfering with employees in the exercise of the rights guaranteed in Section 7 of the Act and in holding that there was substantial evidence to support such provision in the order.

8. In decreeing that petitioner offer Walter West reinstatement and make him whole by the payment of back pay and in holding that there was substantial evidence to support such provision in the order.

9. In holding that the utterances of petitioner to its employees on the subject of self-organization overstepped petitioner's constitutional right of free speech.

10. In holding that petitioner engaged in threats and attempts to intimidate its employees in the exercise of their rights under Section 7 of the Act.

11. In holding that petitioner was guilty of unlawful surveillance of its employees.

12. In holding that petitioner made unlawful use of its foremen to oppose unionization of its employees.

Reasons For Granting the Writ.

I.

THERE IS NO EVIDENCE TO SUPPORT THAT PART OF THE BOARD'S ORDER REQUIRING PETITIONER TO CEASE AND DESIST FROM QUESTIONING AND HARANGUING ITS EMPLOYEES CONCERNING THEIR UNION AFFILIATIONS AND ACTIVITIES, AND THE DECREE ENFORCING THE SAME DEPRIVES PETITIONER OF ITS CONSTITUTIONAL RIGHT OF FREE SPEECH AS THAT RIGHT IS DEFINED BY THIS COURT AND BY VARIOUS CIRCUIT COURTS OF APPEALS.

It is firmly established by decisions of this Court that utterances by an employer to his employees with respect to self-organization which, although intended to persuade the employees not to organize or join a union, do not rise to the stature of coercion, are within the right of free speech and may not lawfully be forbidden.

Labor Board v. *Virginia Power Co.*, 314 U. S. 469, 479.
Thomas v. *Collins*, 323 U. S. 516, 532, 537.
Lovell v. *Griffin*, 303 U. S. 444, 450.
Palko v. *Connecticut*, 302 U. S. 319, 326.
Cafeteria Union v. *Angelos*, 320 U. S. 293, 295.

In *Thomas* v. *Collins*, 323 U. S. 516, 532, 537, this Court said (p. 532):

> "This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution * * *. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' *Thornhill* v. *Alabama*, 310 U. S. 88, 102–103; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free

speech, but as part of free assembly. *Hague* v. *C. I. O.*, 307 U. S. 496."

and further (p. 537):

"Accordingly, decision here has recognized that *employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty, Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. *Labor Board* v. *Virginia Electric & Power Co., supra. But short of that limit the employer's freedom cannot be impaired.* The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection."*

In the application of this rule to a given state of facts it is necessary to take two steps: (1) Examine the utterances in question standing alone to determine whether they fall short of coercion and, if they are innocent in that sense, (2) consider whether they occurred as part of a coercive course of conduct and so became unlawful and liable to a prohibitory order.

1. The Utterances of Petitioner to Its Employees Were Not Per Se Coercive.

We shall first consider by categories all of the utterances found by the Board to have been addressed by petitioner to its employees. In a few instances, which will be noted, the findings as to what was said lacked evidentiary support. In every instance the utterance made by or attributed to petitioner was *per se* innocent.

A. PARTIAL EXPLANATION OF DECISION HOLDING THE ACT CONSTITUTIONAL. (P. App. 989-992.)†

Statements containing an alleged partial explanation of the Act appeared in an article by petitioner's president published

*Emphasis ours throughout unless otherwise indicated.

†The reference is to the findings of the Board.

in the *Lakeside News* (petitioner's house organ) in April 1937 (P. App. 964–970) and in a letter to petitioner's employees dated April 17, 1937 (P. App. 971-972).

It is clear from the authorities that partial and even inaccurate statements with respect to the Act are not *per se* coercive. Thus in *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, this Court held to be innocent, standing alone, a speech to employees which included an erroneous interpretation of the Act, which interpretation appears in the Court's quotation from the speech (p. 473). In *National Labor Relations Board* v. *Auburn Foundry*, 119 F. (2d) 331 (C. C. A. 7), at page 334, the court rejected the contention that a pamphlet entitled "Message to Employees: Facts About the Wagner Act" constituted interference with the rights of employees because it emphasized what the Act did not purport to do rather than what it did. We believe this Court will recognize that probably it was not humanly possible for anyone in April 1937 to have given a complete and accurate explanation of the meaning and effect of the Act as time and the process of construction have developed that meaning. The article and letter speak for themselves and under no reasonable interpretation thereof can they be deemed coercive.

B. STATEMENTS THAT EMPLOYEES MAY DEAL INDIVIDUALLY WITH THEIR EMPLOYER. (P. App. 51, 990-992.)

Such statements are contained in the same article in the *Lakeside News* for April 1937 (P.App.964–970), and in the letter to petitioner's employees dated April 17, 1937 (P.App. 971-972). In *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, which had been decided two days before the statements in question were made, and which decision was the subject under discussion, this Court said that the duty to bargain with the certified representative was not to be taken (p.45):

> "* * * 'as precluding such individual contracts' as the Company might 'elect to make directly with the individual employees.'"

See comments on this statement in article by E. Merrick Dodd, *Labor Law*, 58 Harvard Law Review 1018-1071, at pages 1027-1028.

The Board's holding that a statement identical in substance with this, which was made immediately following the decision and in the course of comment on it, was coercive is a flagrant invasion of the right of free expression, even though the statute has since been differently interpreted. So far as anyone could then know, petitioner's statement, when made, was in accord with the law, and petitioner should not be condemned for having made it.

C. PROMISES TO PROTECT EMPLOYEES FROM UNLAWFUL PRESSURE TO JOIN UNIONS. (P. App. 994.)

In *Midland Steel Products Co.* v. *National Labor R. Bd.*, 113 F. (2d) 800 (C. C. A. 6), the court held lawful a notice posted by an employer containing the statement that (p. 802):

> " 'The Company will do everything that it lawfully can do to see that no employee is coerced, misled or intimidated to make him join any union or association.' "

Statements of this character in the case at bar should not have been found to be coercive. They were proper under the foregoing decision and there was ample occasion for making them in the threats of violence that had occurred (P. App. 193, 303, 359, 451, 452, 456).

Furthermore, the only theory on which a promise of protection against union intimidation could be held bad would be that it implies that unions are in the habit of intimidating. The decisions squarely hold that direct statements to that effect do not overstep the limits of the right of free speech. *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423 (C. C. A. 10), 430; *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C. C. A. 5), 150; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), 912. By the same token a mere implication does not do so.

D. REFERENCES TO AND DEROGATORY COMMENTS CONCERNING UNION DUES. (P. App. 993-994, 995, 1009, 1010.)

There are findings that petitioner implied or said that union dues were burdensome, that it was unnecessary to pay such a price for a job, that they were the only thing union organizers were interested in, etc.

Such statements have been repeatedly held harmless by the courts. *National Labor Relations Bd.* v. *Union Pacific Stages*, 99 F. (2d) 153 (C. C. A. 9), 161 (employees not obliged to pay tribute); *Midland Steel Products Co.* v. *National Labor R. Bd.*, 113 F. (2d) 800 (C. C. A. 6), 802 (you do not need to pay dues to anyone to get a square deal at Midland); *Edward G. Budd Mfg. Co.* v. *National Labor Rel. Board*, 142 F. (2d) 922 (C. C. A. 3), 931 (there is no law * * * to compel you to pay dues); *National Labor Rel. Board* v. *American Tube Bend. Co.*, 134 F. (2d) 993 (C. C. A. 2), 997 (you have got to make up your minds to be willing to pay for * * * representation); *National Labor Relations Board* v. *J. L. Brandeis & Sons*, 145 F. (2d) 556 (C. C. A. 8), 560 (the net from the $63,000 per year (dues) should be very substantial); *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C. C. A. 5), 150 (paying the union off); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), 913 (why should I pay money to this crowd for nothing).

Clearly neither references to nor derogatory comments upon union dues are in themselves coercive.

E. WARNINGS OF STRIKE ACTION IN CASE PLANT BECAME UNIONIZED. (P. App. 997, 999-1000, 1010.)

This Court in *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, approved a letter containing a statement that employees of the company might be approached by union organizers, that such campaigns were being pressed in various industries and that "strikes and unrest have developed in many localities."

Warnings similar to those found to have been given by petitioner were also held innocent in *National Labor Relations*

Board v. *J. L. Brandeis & Sons*, 145 F. (2d) 556 (C.C.A. 8), 560. The Board itself in *Libbey-Owens-Ford Company*, 63 N. L. R. B. 1, has subsequently held innocent a pre-election letter containing the following rhetorical question (p. 13):

> "If this particular union wins the election, will it result in strikes, lost time, and unrest?"

We thus have the authority of this Court, the Circuit Court of Appeals for the Eighth Circuit, and the Board itself, that warnings of strike action in case of unionization are innocent. The Board's contrary holding in this case is clearly erroneous, particularly as the possibility of a strike had been discussed among petitioner's employees (P. App. 195).

F. INTIMATING DISAPPROVAL OF UNION ACTIVITY IN WARTIME.

The Board rested heavily on the finding that petitioner had intimated that there was something unpatriotic in organizational efforts in wartime (P. App. 52). The statements speak for themselves (P. App. 995).

In *National Labor Relations Board* v. *J. L. Brandeis & Sons*, 145 F. (2d) 556 (C.C.A. 8), the court (p. 560) quoted at length from language much stronger than any used by petitioner's representative and held the same to be within the employer's right of free speech.

We believe this Court will recognize that no one, employer or otherwise, should in wartime be deprived of the privilege of intimating (which is the most that petitioner's statements did) that the boys are out fighting for the principles he believes in. Such a clipping of the oratorical wing would be a needless cruelty. No one believes such a statement unless he otherwise sees eye to eye with the speaker, because each is patriotically convinced that the boys are fighting for what he himself is attached to.

G. DEROGATORY STATEMENTS ABOUT UNIONS AND UNION ORGANIZERS. (P. App. 993, 994-995, 1005, 1010.)

There are numerous decisions holding that employers may make derogatory remarks about unions and union officials with entire propriety. *National Labor Relations Board* v. *Citizen-News Co.*, 134 F. (2d) 962 (C.C.A. 9), 970 (a remark by the company's business manager that "the Guild (a union) was not a reputable organization," and "how terrible the C.I.O. was, and the Guild was, and the strikers were"); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C.C.A. 6), 912 (a pamphlet distributed to employees referring to unions as "outsiders" and a "racket" and stating that the union organizers "got their labor movement education in Russia" and that "it all looks and smells like Communism") (See 14 N. L. R. B., pp. 376–377); *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C.C.A. 5), 150 (a statement by the employer's manager that "a racketeer had started the union and a bunch of racketeers headed it"); *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423 (C.C.A. 10), 430 (a statement characterizing union members as "a bunch of racketeers and gangsters").

H. INQUIRIES OF EMPLOYEES CONCERNING THEIR MEMBERSHIP IN UNION. (P. App. 54, 1038-1039.)

It has been repeatedly held that such inquiries are innocent. *National Labor R. Board* v. *East Texas Motor Freight Lines*, 140 F. (2d) 404 (C. C. A. 5), 405; *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C. C. A. 5), cert. den. 320 U. S. 772; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), 913.

I. STATEMENTS THAT PETITIONER WOULD NEVER MAKE A CLOSED SHOP AGREEMENT. (P. App. 997, 998, 999, 1000, 1002, 1004.)

Statements of this character have come before the courts in many cases and have always received approval. *National Labor Rel. Board* v. *American Tube Bend. Co.*, 134 F. (2d) 993 (C. C. A. 2), 997; *Continental Box Co.* v. *National Labor Rela-*

tions Bd., 113 F. (2d) 93 (C. C. A. 5), 94, 96; *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153 (C. C. A. 9), 163.

The Board itself has repeatedly held that refusal to discuss a closed shop is not an unfair labor practice: *Trenton Garment Company*, 4 N. L. R. B. 1186, 1195; *Purity Biscuit Company*, 13 N. L. R. B. 917, 920; *Cullom & Ghertner Company*, 14 N. L. R. B. 270, 276; *Kroger Grocery & Baking Company*, 27 N. L. R. B. 250, 255; *Sam M. Jackson, et al.*, 34 N. L. R. B. 194, 200, *Montgomery Ward & Co., Incorporated*, 39 N. L. R. B. 229, 233.

Accordingly, petitioner's statements to the effect that it would never enter into a closed-shop agreement, but would bargain with respect to other matters (P. App. 241–242, 286, 430–431) were entirely within its legal rights.

J. STATEMENTS THAT PETITIONER WOULD NOT BARGAIN WITH THE UNION.

The trial examiner found that petitioner's general superintendent, Busby, had said to a union officer in the hearing of employees who were going in and out of the building that the Union would not get inside for a conference with the petitioner in twenty years, and that the petitioner had not started negotiations with the Union and never would (P. App. 1011, 1012). The Board made no mention of the matter but did give its blanket approval to everything said by the trial examiner in a 130-page report (P. App. 974–1103) that was not inconsistent with the Board's own findings (P. App. 50). The version of the incident found by the trial examiner was denied by Busby (P. App. 404–406).

The remark that the Union would never get into a conference was clearly nothing more than an expression of opinion that the Union would never get a majority. The statement that petitioner had not *started* negotiations with the Union and never would merely meant that petitioner would not recognize the Union voluntarily, *i. e.*, would not deal with it until certified.

It is lawful for an employer to insist upon certification before dealing with a union. *National Labor Relations Board* v. *Empire F. Corp.*, 107 F. (2d) 92 (C. C. A. 6), 94; *North Electric Mfg. Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), 889. The statement that such a course would be pursued is therefore lawful.

To consider this trivial incident as evidence of coercion is to put petitioner, as this Court stated in *Thomas* v. *Collins*, 323 U. S. 516, "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion."

K. PERSONAL CONVERSATIONS BETWEEN SUPERVISORS AND EMPLOYEES.

There were findings by the trial examiner (P. App. 1017–1019) and by the Board (P. App. 53–55), one of which was commented on by the court (R. App. 536–537), as to a conversation between department manager Flexman and Caldwell and a conversation between Flexman and Dorn, which deserve special attention because the Board in effect characterized them as containing the most threatening remarks made to employees (P. App. 55).

The conversation between Flexman and Caldwell occurred in March 1943, after Caldwell's name had been published in a Union bulletin. According to the finding, Flexman told Caldwell that the publicity he had received made him a marked man and that he probably would not in the future receive the responsibility that he deserved, but that he could redeem himself by resigning from the (Union) Council (P. App. 53–55, 1017). Flexman denied making the statement as found by the Board. He also testified, and in this was not contradicted by Caldwell, that he told Caldwell that he had a perfect right to do what he had done and that he would never be discriminated against for so doing. Flexman also testified, and in this he was not contradicted, that Caldwell as a boy had been one of the first ap-

prentices that he had trained and that he had told Caldwell that he was not talking to him as a supervisor but as man to man (P. App. 470–471). It is proverbial that the relationship of teacher and pupil may be of the closest personal nature. Moreover, the fact that the relationship between two persons is that of supervisor and supervised does not preclude legitimate personal relations.

> "The use of the word (influence) is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee." *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568.

It is well settled that there can be such a thing as a personal conversation between a supervisor and an employee under him which does not bind the employer. *Indianapolis Power & Light Co.* v. *National Labor Relations Board*, 122 F. (2d) 757 (C. C. A. 7), 763; *Quaker State Oil Refining Corp.* v. *National Labor Relations Board*, 119 F. (2d) 631 (C. C. A. 3), 633; *National Labor Relations Board* v. *Montgomery Ward & Co.* (C. C. H. Labor Law Serv., Vol. 3, p. 69,953), October 23, 1946.

We submit that this was such a conversation. Not only did the circumstances support that characterization of it, but there is the further important fact that it is not claimed that the conversation had the slightest influence on Caldwell. In the *Quaker State Oil case*, just referred to, where the Second Circuit Court of Appeals set aside a finding that such a conversation was coercive, the court said (p. 633):

> "It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union."

The tenor of Flexman's remarks to Dorn was that if Dorn stuck with the firm he would be well taken care of. Admittedly the conversation was held at Dorn's request and admittedly

Dorn gave Flexman his assurance that everything that was said would be in confidence (P. App. 1018, 1019). Clearly the conversation was a personal one and the authorities cited in connection with the Caldwell conversation apply.

Moreover it is not asserted that Dorn was influenced by the conversation and in the circumstances he could not have been. In three speeches delivered to different groups of employees in December 1942, Busby, the general superintendent, made the following statement regarding the employees' right to join the Union:

> "You have a perfect right to do just as you please regarding this matter and regardless of what you do there will be no discrimination against you." (P. App. 80, 81, 84.)

In two speeches made late in the same month to other groups of employees, Busby said:

> "I want to close by saying that you all have the right under the Wagner Act to join or not join the Union as you see fit. We intend to protect you in that right. In either case there will be no discrimination against you. It is your right to make this choice." (P. App. 88, 91.)

Petitioner repeatedly gave similar assurances to its employees.*

As stated by the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *J. L. Brandeis & Sons*, 145 F. (2d) 556 (p. 567):

> "In considering these remarks it must be borne in mind that respondent had consistently proclaimed, both by spoken and written words, its fixed policy that employees were free to join or not to join a union and to vote accordingly without fear of reprisals from respondent. * * * When, as here, an employer has clearly defined his attitude of noninterference, the expressions of minor supervisory em-

* (P. App. 285, 292, 295, 299, 301, 307–308, 315, 319, 332, 393, 458–460, 465, 476–477, 522, 572, 587, 591–592, 593, 603, 661, 681, 706, 714, 717, 735, 738, 751, 954, 955, 956, 959, 960–961, 972.)

ployees to the contrary must be regarded as their individual views—they speak without authority from their employer. *National Labor Relations Board* v. *Clinton Woolen Mfg. Co.*, 6 Cir., 141 F. 2d 753; *Utah Copper Co.* v. *National Labor Relations Board*, 10 Cir., 139 F. 2d 788."

And as said by the same court in *National Labor Relations Board* v. *Montgomery Ward & Co.* (C. C. H. Labor Law Serv., Vol. 3, p. 69,953), decided October 23, 1946 (p. 69,965):

> "Chance remarks can not be held to constitute interference where, as here, the employer's attitude has been definitely and emphatically announced and adhered to. In view of the respondent's explicit instructions, the isolated remarks of these employees can not be considered as reflecting the policy of the management."

L. STATEMENTS THAT UNIONIZATION WOULD RESULT IN CHANGES FOR THE WORSE.

There were many findings with respect to statements of this character which the Board stressed heavily in reaching the conclusion that petitioner had been guilty of interference with its employees' right to organize. The court singled out some which it adopted (R. App. 534–535). Such findings include statements to the effect that unionization would result in no larger earnings and no better but possibly worse working conditions (P. App. 1000), in the loss of existing benefits including discontinuance of the bonus system (P. App. 1000–1001), in petitioner's having to raise its prices so that fewer contracts would be obtained and petitioner would not be able to continue the guarantee of a minimum work week (P. App. 1006–1008, 1011) but would have to send employees home when there was no work (P. App. 1011, 1015), and in petitioner's not being able to take the Sears job because it couldn't rely on its employees (P. App. 1008); that the Union had nothing to offer Donnelley employees (P. App. 1000, 1005); that the total earnings of Donnelley employees were higher than those in union shops (P. App. 1004); that comparing Donnelley with union annuity and pension plans an employee would be crazy to join the Union (P. App.

1009); and that some shops paying union wages were going bankrupt (P. App. 1008).

It is clear from the contents of these statements (thus briefly summarized) that they were not threats of retaliation but predictions of what would happen as an economic consequence of unionization. There is clear authority for the proposition that statements to employees with respect to the anticipated necessary consequence of unionization are entirely proper. *National Labor Relations Board* v. *Citizen-News Co.*, 134 F. (2d) 962 (C. C. A. 9), 965; *National Labor Relations Board* v. *American Tube Bend. Co.*, 134 F. (2d) 993 (C. C. A. 2), 996.

Such statements and predictions are nothing but an appeal to reason, which is the essence of the right of free speech. The union advocate and organizer is free to discourse without restraint on the benefits of unionization, making the picture as rosy as the limits of his imagination and his estimate of the credulity of his audience will permit. It is just to neither the employer nor his employees to require the former to remain mute while the latter are given what may well be a distorted understanding of the benefits of organizing. To do so may later result in disappointed employees, strikes and labor strife, which the Act was avowedly designed to prevent.

The employer is entitled to present his side of the case and if the constitutional guarantee of free speech means anything it means that he is not to be denied this right through the device of treating his arguments as threats of discrimination.

In view of the number of findings as to the utterances of the petitioner, an examination thereof has of necessity been long, even though each type of finding has been given minimum consideration. We believe it has been demonstrated that in and of themselves the utterances, whether taken singly or collectively, do not overstep petitioner's right of free speech. The next question is, can they be considered coercive because they occurred as a part of a course of coercive conduct?

2. The Utterances of Petitioner to Its Employees Did Not Occur as a Part of a Course of Coercive Conduct.

The record is barren of any evidence of coercive conduct on the part of petitioner that can be said to have corrupted or made illegal petitioner's statements to employees that were otherwise innocent. In the summary of the reasons why it agreed with the trial examiner that petitioner's conduct was coercive and in violation of Section 8 (1) of the Act (P. App. 54-56), the Board mentioned only the alleged discriminatory demotion of Walter West and certain statements referred to below. West's demotion (hereinafter discussed, pp. 34–39), whether discriminatory or not, can not have made illegal the statements condemned by the Board for the reason that it did not occur until after those statements had been made.* It was not a part of the background against which they occurred and could not have affected their impact on the minds of the employees.

The statements condemned by the Board were held illegal *per se* because they "reflect a calculated and sustained determination by the respondent (petitioner) to frustrate the employees' freedom of choice in selecting a bargaining representative." (P. App. 55.) If this means anything more than that petitioner attempted to influence the decision of its employees by argument, we believe it has been demonstrated by our discussion of petitioner's utterances (*supra*, pp. 11-22) to be an unwarranted conclusion. This Court has held that employers have the right to attempt to influence their employees by argument or "to persuade to action with respect to joining or not joining unions." *Thomas* v. *Collins*, 323 U. S. 516, 537.

The Board's ultimate finding in connection with petitioner's

* West was demoted on April 15, 1943 (P. App. 1066). This was long after all of the important utterances by supervisory officials above the rank of foreman on which the Board relies as showing coercion. The only statements that occurred or may have occurred after that date were one by superintendent Walker to employee Ray "in April, 1943" (R. App. 590) and a statement by Busby to Kopecky in September 1943 that if the shop was union he would be sent home instead of repairing his machine (R. App. 146).

utterances, that petitioner "sought to and did use its economic power as an employer to intimidate its employees in the exercise of the rights guaranteed by the Act" (P. App. 56), is clearly in the teeth of its own evidentiary findings. Thus it held that petitioner's conduct prior to the President's Reemployment Agreement was lawful (P. App. 50, 1090); that petitioner's hiring policy was lawful (P. App. 50); that petitioner's rule with regard to union activity on company time and property and the administration thereof were lawful (P. App. 60); that petitioner's treatment of Gates was lawful (P. App. 61); and that all of the other instances of alleged discriminatory conduct on the part of petitioner as to which evidence was introduced, fifteen in number, were lawful (P. App. 50, 57-58), except only the West demotion. This enumeration covers every use of its economic power of which petitioner was accused, and (except the West demotion, which occurred long after all the important statements were made) the Board itself found every such accusation groundless. Clearly, there was no course of coercive conduct.

It is respectfully submitted that the statements properly attributable to the petitioner were *per se* innocent under the decisions of this Court and of the various circuit courts of appeals defining the limits of the right of free speech, and that there was no course of coercive conduct of which they could have formed a part and therefore be held coercive. It follows that the portion of the order commanding petitioner to cease and desist from questioning and haranguing its employees concerning their union affiliation and activities deprives the petitioner of its constitutional right of free speech as that right has been construed by this Court and should be set aside.

II.

THERE IS NO EVIDENCE TO SUPPORT THAT PART OF THE BOARD'S ORDER REQUIRING PETITIONER TO CEASE AND DESIST FROM INSTRUCTING ITS FOREMEN TO MAKE STATEMENTS TO ITS EMPLOYEES CONCERNING LABOR ORGANIZATIONS WHICH TRANSGRESS THE PROVISION OF THE ACT.

The Board held (Note 4, P. App. 53-54) that "the foremen in their capacity as members of the bargaining unit had the same freedom of action as all other employees with respect to joining or not joining unions and expressing their opinions on the subject." This would seem to make it clear that petitioner's foremen, as long as they acted on their own responsibility and without authorization or ratification by petitioner, could say anything they wished with respect to union organization without binding petitioner.*

The petitioner told its employees repeatedly that they could join or not join the Union as they wished without affecting their employment status,† and there is not the slightest evidence in the record that it ever instructed its foremen to make statements to its employees which transgress the provision of the Act. The evidence is all to the contrary. Yet the order directs the petitioner to cease and desist from so instructing its foremen.

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* In this regard this case should be sharply distinguished from the cases involving foremen in other industries, where the question has been raised whether they are employees within the meaning of the Wagner Act. In the printing industry foremen are part of the bargaining unit of production workers and, as such, the Board has held they enjoy all the privileges of union activity which Section 7 of the Act guarantees. *W. F. Hall Printing Co.*, 51 N. L. R. B. 640, 644; *Jones & Laughlin Steel Corporation*, 51 N. L. R. B. 1204; *Country Life Press Corporation*, 51 N. L. R. B. 1362, 1364; *Union Bag & Paper Corp.*, 52 N. L. R. B. 591, 593; *Service Printers, Incorporated*, 54 N. L. R. B. 1082, 1084.

† (P. App. 80, 82–83, 84–85, 88, 91–92, 285, 292, 295, 299, 301, 307–308, 315, 319, 332, 393, 458, 459, 460, 465, 476, 477, 522, 572, 587, 591–592, 593, 603, 661, 681, 706, 714, 717, 735, 738, 751, 954, 955, 956, 959, 960, 961, 972.)

The fact is that the Board did not find that the petitioner had so instructed its foremen. It found that petitioner "encouraged, authorized, *or* ratified their activities *or* acted in such manner as to lead the employees reasonably to believe that the foremen were acting for and on behalf of management" (Note, P. App. 54). These findings, as will be noted, are in the disjunctive. There is no positive finding that the petitioner actually encouraged, actually authorized, actually ratified, or actually acted in such manner, etc. If petitioner is not to be held responsible for the conduct of its foremen as a matter of law, then the only way in which it can be held liable for their conduct is upon the ground that it did something which under the law would make it responsible. The Board totally failed to find as a fact that the petitioner did any particular thing which would have that effect. It was manifestly determined to find that petitioner did something or other, just what it could not say, or at least did not say, which was sufficient to make it liable. This so-called finding is a mere statement that petitioner did something to make it so liable, which is nothing but a conclusion of law. It is therefore "subject to judicial review and, on such review, the court may substitute its judgment for that of the board." *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491.

Furthermore, if the finding be treated as a finding that the petitioner actually encouraged, actually authorized, *and* actually ratified, etc., there is no evidence to support it. The evidence showed without contradiction that the foremen were instructed regularly at foremen's meetings that all employees had a right to join the Union or not as they saw fit and that whatever they did would have no effect on their jobs (P. App. 273–274), that foremen were under no circumstances to open the subject (P. App. 294, 390, 391, 396, 667, 679, 706, 717, 738), but that if asked they could discuss the pros and cons (P. App. 273–274, 603, 614, 640, 679, 683, 714, 717, 739). The record is barren of any evidence that they were instructed or authorized to do more. Every foreman who engaged in any such activity testified that he was not instructed to do so and

that he made no report on it to his superiors (P. App. 602–603, 614, 615, 617, 645, 662, 667, 671–672, 691–692, 695, 696–697, 698, 721, 736, 737, 740).

There is no evidence whatever to indicate that supervisory employees above the rank of foreman had any knowledge of activities which foremen may have engaged in contrary to instructions. It was never asserted before the Board that they had such knowledge, nor was evidence offered in an attempt to prove it, because the Government tried the case on the theory that petitioner was responsible for the activities of its foremen as a matter of law. Having had no knowledge of any activity of its foremen contrary to its instructions to them, petitioner could not be held to have ratified any such activity or to have led its employees to believe that in engaging in any such activity they were acting for it and in its behalf, in the absence of a clear showing that it gave its employees to understand that it approved of everything that its foremen did, whether or not within the scope of their customary authority. There is absolutely no showing that petitioner ever did anything to give its employees such an understanding. On the contrary, as previously pointed out, petitioner repeatedly assured its employees that their activity in regard to self-organization would not be interfered with but that they would be protected by petitioner in the exercise of their rights in that behalf.

The Board also found (P. App. 54):

> "The record shows that at foremen's meetings the foremen were regularly schooled in the respondent's (petitioner's) official anti-union philosophy and arguments and that the respondent (petitioner) expected, and in effect authorized, foremen to combat on its behalf the Union's organizing efforts."

Accepting this finding as justified, it does not constitute a finding that petitioner authorized its foremen to do anything which petitioner might not lawfully do. There can be no question that the petitioner had the right to acquaint its foremen with

the arguments against unionization, nor that it could authorize them to use such arguments if they desired to do so. That is a part of petitioner's right of free speech. That petitioner authorized its foremen to "combat" organizing efforts is highly ambiguous. If it means that the foremen were authorized to do anything else than to discuss the pros and cons of unionization, as above pointed out, it is not supported by anything in the record.

It should never be forgotten that on the subject of unionization the foremen were interested as principals, not as mere agents of petitioner. They had a vital interest in the question as to whether they were in the future to deal with the petitioner in person or through a union representative. Some favored the Union, others were strongly opposed to being represented by it. Both foremen and hourly paid employees were campaigning on both sides, some of both classes advocating unionization and some opposing it.* If some of them in the heat of their opposition to the Union said things that were contrary to petitioner's repeatedly expressed policy, the petitioner should not be held responsible therefor. Such incidents will almost inevitably arise wherever employees in a supervisory capacity are also held to have the rights guaranteed by Section 7 of the Act; and as a practical matter the employer is powerless to prevent them.

The question of the responsibility of the employer for unauthorized activities of its supervisory employees in such circumstances is an important question which has not been but should be decided by this Court.

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* For example, foremen were going to union meetings (P. App. 295, 499, 500; R. App. 19, 33, 61, 62, 63) as well as opposing unionization. Some were union members (P. App. 126).

III.

THAT PORTION OF THE ORDER REQUIRING PETITIONER TO "CEASE AND DESIST FROM INSTRUCTING FOREMEN AND SUPERVISORS TO MAKE STATEMENTS TO THEIR EMPLOYEES CONCERNING LABOR ORGANIZATIONS WHICH TRANSGRESS THE PROVISION OF THE ACT" IS VOID FOR UNCERTAINTY UNDER THE DECISIONS OF THIS COURT.

In addition to lacking evidentiary support, as above set forth, this clause of the order is manifestly void for uncertainty. In *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, this Court said (p. 433):

> "It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, *state with reasonable specificity the acts which the respondent is to do or refrain from doing.*"

In *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, this Court, in holding an order of the Board not sufficiently specific, said (p. 341):

> "*A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court.*"

Under this principle an order which prohibits all possible violations of law cannot stand. In *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, this Court said (p. 410):

> "The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' "

See also *Swift and Company* v. *United States*, 196 U. S. 375, 396.

Under the foregoing rule, this clause of the order, which in substance prohibits statements concerning labor organizations

"which transgress the provision of the Act," should be set aside. To uphold it would be to subject petitioner to the penalties of contempt for any statement which the Court might find to be inconsistent with the general mandate of the Act and not within the limits of its right of free speech, without any particular statements or types of statement having been enjoined. The following language of this Court in *Thomas* v. *Collins*, 323 U. S. 516, is peculiarly applicable to petitioner's predicament here (pp. 535–536):

> "The effort to observe it could not be free speech, free press, or free assembly, in any sense of free advocacy of principle or cause."

IV.

THERE IS NO EVIDENCE TO SUPPORT THAT PORTION OF THE ORDER REQUIRING PETITIONER TO CEASE AND DESIST "FROM MAINTAINING A SYSTEM OF REPORTS ON UNION ACTIVITIES IN THE PLANT."

The Board's finding* which is the basis of this portion of the order involves two separate types of activity; (1) inquiries by foremen and other officials of petitioner with respect to union membership of employees and applicants for employment, and (2) acceptance of information on such matters from foremen by their superiors.

* The Board's finding is as follows (P. App. 54):

> "Also forming part of the respondent's [petitioner's] counter-campaign against the Union was its unlawful practice of obtaining, and circulating among its hierarchy, information concerning the union activity of its employees, as found by the Trial Examiner. The record shows that on numerous occasions foremen and other officials of the respondent [petitioner] interrogated employees and also applicants for employment, with respect to their union membership and activity. Likewise, it was common practice for foremen to give information on such matters to their superiors, who not only readily accepted it but also tacitly approved of and encouraged such reporting. Considerable information about the Union was made known to the respondent's [petitioner's] top officials in numerous oral reports and in at least three written memoranda."

It has already been pointed out that the foremen were vitally interested in union membership and activity as principals since if the plant was unionized the Union would bargain for them as well as the non-supervisory employees. It has also been pointed out that they had the right as principals to engage in union activity and to aid or oppose the organizing efforts of the Union and to be fully informed about all union affairs, and that the inquiries were with regard to such matters. The point has also been previously made that there was no authorization or ratification of the foremen's conduct and that hence it did not bind petitioner. (*Supra*, pp. 24-28.)

This leaves for consideration inquiries concerning union membership and activities by officials above the rank of foreman and the acceptance of such information from foremen. We refer to the inquiries first. Prior to October 1933 petitioner used an inquiry form containing, among other things, a question as to the union affiliations of applicants for employment, which form was sent to the applicant's former employers whom the applicant gave as references (P. App. 962). A new form omitting the inquiry about union affiliation was substituted for the old in October 1933 (P. App. 559), after petitioner had signed the President's Reemployment Agreement, by which it undertook to observe the requirements of Section 7a of the National Industrial Recovery Act prohibiting interference with union activity (P. App. 942–946). It appeared, however, that some of the old forms had inadvertently become commingled with the new, and unknown to petitioner's employment manager, had been used in about 1,000 out of about 4,000 cases between the adoption of the new form and May 1937, when Littell (petitioner's president) happened to learn of an instance of such use, whereupon all old forms were at once sorted out and destroyed and none was thereafter used (P. App. 517–518, 535, 563–567). Although the use of this old form had been finally and completely discontinued for approximately 8 years, the Board adopted the finding of the trial examiner (P. App. 50, 1037) that its use between 1935 and 1937 had been

deliberate and used this finding to help bolster its order directing the petitioner to cease and desist from maintaining a system of reports, et cetera. Furthermore, there would have been nothing inherently unlawful in petitioner's continuing to request the information, so long as it made no discriminatory use thereof in hiring applicants for employment.* But that issue was exhaustively tried and on the Board's own finding no single instance of a discriminatory refusal to hire was proven. Petitioner discontinued the use of the old form not because it could not lawfully make the inquiry, but because upon signing the President's Reemployment Agreement it promised to obey Section 7a and to make no discrimination between union and non-union men in its hiring policy and consequently had no use for the information.

The record discloses no inquiries by supervisors above the rank of foreman with regard to the union affiliation or activities of employees.†

Superintendent Busby sent three short memoranda to Zimmermann, petitioner's vice president, two in June and one in August 1943, containing information volunteered to him by foremen, either directly or through Sperry, assistant superintendent. They were simple recitals of information and speak for themselves. One relates to the opening of union headquarters and the others to union meetings (Res. Exs. 6, 7, 8; R.

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* Mere inquiries with respect to union affiliation, unaccompanied by acts of discrimination, are not unlawful. *National Labor R. Board* v. *East Texas Motor Freight Lines*, 140 F. (2d) 404 (C. C. A. 5), 405; *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C. C. A. 5), 152, cert. den. 320 U. S. 772; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905 (C. C. A. 6), 913.

† In the conversation between superintendent Walker and Ray, an employee, the latter volunteered the information that he was a union member (P. App. 590–591) and superintendent Castellanet inquired of employee Zad who was wearing a union button what he thought he was going to gain by union membership, to which the latter replied he thought better working conditions and more money (P. App. 187, 337–338).

App. 528–529). There is not the slightest evidence that any employee other than the secretary to whom Busby dictated them ever knew of their existence. They were the only written reports of the kind Busby ever sent to petitioner's executive officers, and he was under no instructions to send them (P. App. 281). There is no evidence that there were any other written reports.

What the Board characterizes as oral reports were mentioned by Donnelley (P. App. 123–129), Zimmermann (P. App. 252–253) and Busby (P. App. 402–403, 455). These referred to union meetings, when and where they were held and the number of employees that attended (P. App. 124–125, 402–403). The evidence is clear and uncontradicted that there were no instructions by top management to supervisory officials to obtain such information (P. App. 253, 369–370). They never asked for it at any time or said that they were interested in it (P. App. 373). It came casually or incidentally as a part of the gossip of the day, but it was never formal and there was no routine or system of reports (P. App. 124–129) and no record was ever kept of the information (P. App. 126). The foremen who volunteered the information testified without contradiction that they were never requested to interrogate employees concerning unions and union membership and activities (P. App. 646, 697, 698, 736).

The mere receipt by supervisory employees of such reports is lawful. *National Labor Relations Bd.* v. *Botany Worsted Mills*, 106 F. (2d) 263 (C.C.A. 3), 268. It is entirely proper for an employer to find out whether his employees have formed a union, *National Labor R. Board* v. *East Texas Motor Freight Lines*, 140 F. (2d) 404 (C.C.A. 5), 405, and as to the progress of the efforts of unionization, *Jacksonville Paper Co.* v. *National Labor R. Board*, 137 F. (2d) 148 (C.C.A. 5), 152, cert. den. 320 U. S. 772.

There is not the slightest evidence that petitioner ever used any of the fragmentary information so obtained in any attempt

to deprive any employee of his rights under the Act. It is on the basis of such trivialities that the order requiring petitioner to cease and desist from maintaining a system of reports on union activities in its plant rests. And it is only by considering petitioner's utterances "in the context" of such trivialities that it is sought to justify other portions of the order which would effectively deprive petitioner of its right of freedom of speech guaranteed by the Constitution. Apparently an employer must be content to be and remain blind, deaf and dumb unless he is by decree to be branded as a violator of the law and be compelled to conduct all his activities under the threat of punishment for contempt for the exercise of liberties which were formerly supposed to be the birthright of every American and protected by constitutional guaranties.

V.

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE PORTION OF THE ORDER REQUIRING PETITIONER TO REINSTATE WALTER WEST, AND THE COURT'S HOLDING TO THE CONTRARY IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND WITH ITS OWN DECISIONS.

On March 4, 1943, West and an employee under him named Nazar smoked during working hours in the film storage room while playing a game of chess. This was in violation of the established rule against smoking in manufacturing departments (P. App. 949–950, 953). There was loose film on the floor, some of which was explosive (P. App. 211, 217, 921–922, 212–215, 887). The foregoing facts are not questioned. There was also evidence that in other respects West's conduct as a foreman had not been satisfactory (P. App. 880). When, after a careful investigation, it was established that West had violated the petitioner's no-smoking rule under the above mentioned circumstances, he was demoted from working night foreman to finisher (P. App. 883).

The trial examiner's ultimate finding was that West was demoted primarily on account of his union affiliation and activities (P. App. 1079). The Board affirmed this finding without comment on the evidence (P. App. 61).

There was direct and positive testimony by Busby, petitioner's superintendent, that union activity was not the motive for West's discharge (P. App. 912–913). This testimony is not contradicted or impeached by the direct testimony of any witness. Space does not permit, nor does the point we here wish to make require, a further review of the evidence.

1. The Decision of the Court Below Is In Direct Conflict With the Decisions of This Court.

In its brief filed in the court below the respondent said (R. App. 564), "The Board, of course, does not contend that petitioner *could not* have demoted West because of his alleged offenses if that, rather than his pro-union activities, was *in fact* the motivating reason." (Emphasis the Board's.)

The respondent in said brief also admitted "*that the evidence might also have supported a finding of a kind that the petitioner urged upon the Board.*" The Board further said, "But the fact that the evidence might support either of two inconsistent inferences does not permit setting aside the inference and finding made by the Board" (R. App. 566).

The court below, after stating that although "petitioner had a perfect right" to demote West "for violating the no-smoking rule," said the Board had found that the smoking incident was a pretext and that "This was a reasonable *inference to be drawn from the circumstances* and is supported by substantial evidence in the record" (R. App. 541).

In view of the Board's admission that from the facts established the evidence was open to either the inference that petitioner's motive for the discharge of West was a violation of its no-smoking rule or the inference that the motive was union

activity, the court committed error in holding that the Board's finding was supported by substantial evidence. Neither the Board nor the court was at liberty, in the face of the positive and uncontradicted testimony of Busby, an unimpeached witness, to the contrary, to find as a fact that petitioner's motive was West's union activity.

In *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, this Court said (p. 340):

> "And *the desired inference is precluded* for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be *inferred* from proven facts, and this is not permissible in the face of the *positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved*, from which testimony it affirmatively appears that the fact sought to be *inferred* did not exist. This conclusion results from a consideration of many decisions, of which the following are examples:" (Citing many cases.)

To the same effect is *Arnall Mills* v. *Smallwood*, 68 F. (2d) 57 (C.C.A. 5), 59. This principle is stated with many authorities cited in 32 C. J. S., Evidence (p. 1101).

That this principle is applicable to the findings of the Board is established by the decision of this Court in *Labor Board* v. *Columbian Co.*, 306 U. S. 292, when, in holding that the Board's findings must be supported by substantial evidence, this Court said (p. 300):

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' *Consolidated Edison Co.* v. *National Labor Relations Board, supra*, p. 229, *and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.* See *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524; *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra*, 989."

The principles stated by this Court in the *Chamberlain case* were applied to a finding of the Board in *American Smelting & R. Co.* v. *National Labor R. Board*, 126 F. (2d) 680 (C. C. A. 8), 688, where the court held that the rule in that case was applicable to the Board as a finder of fact.

The Board having admitted that the proven facts are alike open to the inference that petitioner's motive was either that assigned by the petitioner or that found by the Board, in the face of Busby's uncontradicted and unimpeached testimony that petitioner's motive was that assigned by the petitioner, the Board could not lawfully draw the inference that petitioner's motive was West's union activity. Since the law forbids the drawing of the inference which the Board drew from the equivocal evidence, such evidence can not be said to constitute any evidence that petitioner's motive was West's union activity.

2. The Decision of the Court Below Is Directly Contrary to That of the Same Court's Prior Position.

The court below did not, and, of course, could not, find that petitioner had no right to discipline West for his violation of the no-smoking rule. The court stated that the usual punishment was a week's suspension without pay (R. App. 541) and such had been the punishment in one case where an ordinary employee had violated the rule. There is no evidence to the effect that smoking by any foreman in the manufacturing department had ever come to the attention of the management prior to the West incident and there is positive evidence to the contrary (P. App. 890–893). Thus there is absolutely no evidence from which it can be said that the discipline of West was not on a par with that imposed on other foremen. Neither was it inconsistent with that imposed on ordinary employees. The West incident was a peculiarly aggravated one in that he smoked in the film room, a dangerous place to smoke, and by his example induced or encouraged an employee under him to smoke in violation of the rule under like dangerous circumstances.

Nevertheless, although the court below stated that petitioner had a perfect right to demote West under the circumstances if its motive was proper, there is, by reason of its reference to the punishment which had been given ordinary employees for violation of the rule, the implication that petitioner's discipline of West was of so severe a nature as to discredit petitioner's avowed motive in administering it. In fact, such must have been the court's view, since under the circumstances no sane man could possibly doubt the right and duty of petitioner to discipline West. It could only have been the measure of the discipline imposed which led the court to uphold the finding that the motive for West's demotion was union activity.

The conclusion reached by the court is directly in conflict with its holding in *Wyman-Gordon Co.* v. *National Labor Relations Board*, 153 F. (2d) 480 (C.C.A. 7), decided approximately four months before this case was decided, wherein the court below said (p. 486):

> "Furthermore, we are of the view that the measure of the discipline is not the proper concern either of the Board or of this court. *In other words, whether petitioner committed an unfair labor practice is not dependent upon the measure of discipline which petitioner saw fit to impose.*"

The foregoing case was cited and followed on this point by the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Montgomery Ward & Co.*, decided October 23, 1946, C. C. H. Labor Law Serv., Vol. 3, page 69,953, at page 69,957, where the court said:

> "The question as to proper discipline was a matter for the decision of the management in its discretion."

Thus the decision of the court below is in essential conflict with its prior decision, rendered approximately four months before its decision in this case, and with a decision of the Eighth Circuit Court of Appeals.

It is obvious that employers are entitled to have at least a semblance of stability in the law which they are expected to obey, particularly in respect to such vital managerial problems as the discipline of employees for the purpose of protecting their property and the life and well-being of their employees. The smoking incident, which the opinion of the court below (R. App. 541) shows was carefully investigated and considered by petitioner, fully demonstrates that West was lacking in some of the essential qualities that petitioner had a right to expect and a duty to require of men who act as foremen. Certainly the policies of the Act can not be effectuated by requiring management to retain in a supervisory capacity men who have demonstrated their unfitness to serve in that capacity. Under the circumstances of this case, union membership and activity have served as a cloak to protect a man who the Board and the court below in effect admitted reasonably deserved demotion, and who the facts demonstrate is lacking in essential fitness to serve in the capacity to which the decree of the court below requires his restoration. Such a result is not only not intended by the Act but is intended to be prohibited by it, for Section 8 (3) of the Act not only prohibits discrimination to discourage membership in labor organizations, but also to encourage it.

Primarily, the petitioner is charged with the responsibility, both legal and moral, for providing safe working conditions for its thousands of employees. Into its hands, and not those of the Board or of any court, is given the keeping of the physical well-being and the lives of its employees during their working hours. In the event of a fire, resulting in disaster and death, it will be the petitioner, and not the Board or any court, that will be called to account. With such responsibility there should go a commensurate control over all the possible sources of danger, including irresponsible and hazardous conduct on the part of supervisory employees.

On the record in this case, the petitioner, without just cause, has been denied appropriate power in the premises by the

decision of the court below which is in essential conflict with the Act itself and with its own prior decision.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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December 14, 1946.

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. A., Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

SEC. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have

power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28.

SEC. 10 (f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 790

R. R. DONNELLEY & SONS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (B. A. 532–542)[1] is reported in 156 F. 2d 416. The findings of fact, conclusions of law, and order of the National Labor Relations Board (P. A. 50–63b, 974–1103) are reported in 40 N. L. R. B. 635.

[1] The record in this Court consists of the appendices to the briefs in the court below (herein designated as "P. A." for petitioner's appendix and "B. A." for Board's appendix), with the addition of the proceedings in the court below, which have been inserted at the end of the Board's appendix and are herein designated also as "B. A." Occasional references to the typewritten transcript of the proceedings before the Board and to Board Exhibits, on file with this Court, are designated "Tr." and "Bd. Exh.", respectively.

JURISDICTION

The decree of the court below (B. A. 575–579) was entered on September 11, 1946. On December 10, 1946, the time for filing the petition for a writ of certiorari was extended to December 18, 1946 (B. A. 583). The petition for certiorari was filed on December 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the Board's findings, sustained by the court below, that petitioner engaged in a course of anti-union conduct which included, among other things, threatening employees that they would suffer an economic loss if they joined a union, questioning employees and maintaining a system of surveillance and reports with respect to their union activities, instructing foremen to participate in petitioner's campaign of opposition to the union, and discriminatorily demoting employee West, in violation of Section 8 (1) and (3) of the National Labor Relations Act.

2. Whether the portion of the Board's order, which directed petitioner to cease and desist from instructing its foremen and supervisors to make statements to its employees concerning labor organization which transgress the provisions of the Act, was void for uncertainty.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 28.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (P. A. 50, 974–976), the Board, on February 17, 1945, issued its findings of fact, conclusions of law and order (P. A. 50–63b, 974–1103). The facts as found by the Board and as shown by the evidence may be summarized as follows:[2]

Prior to 1907, the petitioner had contractual relations with several of the printing trade unions (P. A. 980; B. A. 34, 36–37, Tr. 98, Bd. Exh. 22). The last of these agreements was broken off in 1907 and from that date until the enactment of the National Industrial Recovery Act in 1933,[3] petitioner maintained an "open shop" or "closed non-union shop;" that is, petitioner refused to hire or retain in its employ any worker who became affiliated with a union (P. A. 980–981; B. A. 34–38). During most of this period petitioner made substantial use of the "yellow-dog" contract (P. A. 981–982; B. A. 41, Tr. 318, Bd. Exh. 34, 35), employment application blanks requiring a warranty by the applicant that he did not belong to a labor organization (P. A.

[2] In the following statement, the references preceding the semicolons are to the Board's findings including the portions of the intermediate report which were adopted by the Board (P. A. 50), and succeeding references are to the supporting evidence.

[3] 48 Stat. 195.

981–982; B. A. 41, Tr. 340, Bd. Exh. 36), and inquiry forms requesting former employers to furnish information with respect to the applicant's possible union affiliation (P. A. 982; 104–105, 962, Tr. 347). Petitioner's president, T. E. Donnelley (P. A. 979; Tr. 252), was prominently identified with anti-union employer associations during this period and petitioner publicly advertised its "open shop" policy (P. A. 982–983; B. A. 38, Tr. 283–286, 291, 292, 293, 294, 361, Bd. Exhs. 23 through 26, 39). Petitioner reminded its employees of its "closed non-union shop" policy by printed communications from petitioner's officials to its employees (P. A. 983–984; B. A. 343–344, 509–515, P. A. 108–110, 114, Tr. 400) stating, for example, that "we will continue to operate this plant non-union * * *. We run non-union or not at all" (P. A. 983–984; B. A. 510, 512), and "if [the employees] * * * join the union they would be through here forever" (P. A. 984; B. A. 512).

After enactment of the National Industrial Recovery Act in 1933, petitioner, on August 4, 1933, signed the President's Reemployment Agreement (P. A. 984–985; 942–946, Tr. 2345) which embraced compliance with Section 7 (a) of that Act[4] guaranteeing employees freedom of self-organization and collective bargaining rights. Petitioner's president, T. E. Donnelley, addressing the employees at about this time, stated that while any of petitioner's employees "had a perfect right to become

[4] 48 Stat. 198–199.

a union man or non-union man, as he wished, and there would be no discrimination * * * it would serve better for them to stay non-union, because * * * we could pay them more money and our relations would be very much pleasanter and less controversial * * * if all the grievances were handled direct man to man * * *" (P. A. 985–986; 159–160, 162).

At about this same time petitioner's vice-president, C. G. Littell (P. A. 979, 989; 946, Tr. 2345), in a speech to the employees, assured them that they now had a "right to organize," but that "in this particular business we are very much opposed to unionization," that while a union might be useful "where sweat shop conditions obtain, * * * even then, unfortunately, the employees frequently find that by unionizing they have simply transferred from a rapacious employer to a robber, racketeer, and murderer * * *" (P. A. 986–987; B. A. 517–518, Tr. 401), that the "most important part of all unions is dues. That is what makes the wheels run, makes jobs for the organizer, business agent, etc.," who "try to show how busy they are by making trouble between you and your employer * * *" (P. A. 987; B. A. 520). Littell further warned the employees that there "could be no bonus system in union shops or other recognition of unusual endeavor * * *" (P. A. 987–988; B. A. 520, 521).

On December 8, 1933, Vice-president Littell, in letters sent to certain employees, stated, in part, that the unions were seeking to "take advantage of

the N. R. A. to try to get all shops unionized and all printers paying dues" (P. A. 988; B. A. 523–526, Tr. 403). Littell concluded, "I have said right along, and I say it again, with due consideration of the situation at the present time, that the unions have nothing to offer the employees of R. R. Donnelley & Sons Company" (P. A. 988; B. A. 526). Except for the above-mentioned two speeches of Donnelley and Littell and the December 8 letter of Littell the record contains no evidence that petitioner made any statements to its employees to indicate a change in its policies towards unions and labor-management relations, from the time of the enactment of the Recovery Act to the time when this Court upheld the constitutionality of the National Labor Relations Act in April 1937 (P. A. 989).[5]

Within two days after this Court's decision sustaining the constitutionality of the National Labor Relations Act, petitioner, in frank anticipation of a drive by unions to organize its plant (P. A. 51, 992; 971), undertook to explain the application of the Act to its plant, within the meaning of the Court's decision (P. A. 989, 992; 964, 971, Tr. 404, 406, 665), by an article published by Littell in petitioner's company-owned newspaper (P. A. 51, 989; 964–970, Tr. 404), and a letter dated April 14, 1937 (P. A. 51, 989, 992; 971–972, Tr. 406). The latter was addressed to petitioner's employees and was signed by Donnelley and Littell (P. A. 51, 992;

[5] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.

971–972), who by this time had become petitioner's chairman and president, respectively (P. A. 979; 972). These documents stated that the employees had the "right to organize" but that, at the same time, even where a bargaining representative had been selected by a majority of the employees in an appropriate unit *"those employees in such unit as wish to deal with their employer individually may do so under the Act, and the employer may enter into an individual contract with them concerning wages, hours and other conditions of employment"* (P. A. 990, 992; 964, 971, Tr. 404, 406) [Italics in original]. The news article further represented the Act as an ineffective piece of legislation which could not compel an employer to enter into any agreement, declaring that "You can lead a horse to water but you can't make him drink" (P. A. 51, 991; 966).

The balance of the Littell article and the April 14 letter was devoted to a restatement of petitioner's unremitting opposition to any union in its plant (P. A. 992–994, 1000–1001; compare B. A. 512–526 with P. A. 964–972, Tr. 400, 401, 403). Thus, petitioner depicted union leaders as "outside agitators" who "must still act *as if* they had a real interest in the welfare of the working man" (P. A. 993; 970, italics supplied) but who were in reality an "outside interference" which must be kept out of the plant if the best interests of the Company and the employees were to be served (P. A. 993;

972). Declaring that "For more than thirty years we have maintained the right of any individual to work in this plant without paying dues or obtaining permission from an outside organization * * *" (P. A. 993; 972), petitioner warned its employees that if the plant were unionized "we would have to discontinue our bonus system" because unions "forbid any arrangements that differentiate between workers," and that petitioner would no longer be able to reward by promotion an employee "who showed merit" but "would have to take somebody from the union * * * maybe a much poorer man that the one we wished to promote" (P. A. 1001; 968). Petitioner cautioned its employees that a "change will give you no more mony or better working conditions," but would "add much uncertainty to your employment" because the employees "would be subjected to an outside labor leader who might issue a strike order at any time for matters entirely unconcerned with your employment here" (P. A. 1000; 967).

Neither the letter nor the article mentioned the protection afforded employees by the National Labor Relations Act through its proscription of unfair labor practices (P. A. 51). Petitioner thereby imparted to the employees a misleading and erroneous construction of the Act, which it never corrected (P. A. 51). By interpreting the Supreme Court's opinion in an unfair and distorted manner petitioner sought to, and did, leave the employees with the impression that the Act in practical appli-

cation was meaningless and that therefore it was to their best interest not to organize (P. A. 51).

In 1938, various Chicago locals affiliated with the American Federation of Labor formed an Organization Committee, hereinafter referred to as the Union, for the purpose of organizing petitioner's employees (P. A. 977–978; B. A. 2–7, P. A. 65–66). The Union's organizing drive developed into an aggressive movement during the summer of 1942 and continued to the time of the hearing herein (P. A. 1002–1003; B. A. 2–5, 6–7, 58–60, 110–111, 134–135, 187, 190–191, 205, 224–225, 278–279, 357–358, P. A. 454–455), and petitioner timed an intensification of its counter-campaign to meet it (P. A. 50–51, 1002–1004). During this period petitioner assailed its employees with numerous anti-union speeches and printed statements which were reiterations of the statements issued by petitioner in 1937 (*supra*, pp. 6–8) (P. A. 989–990, 1003–1005; 76–94, 196–197, 954–956, 960–961, B. A. 20–21, 37–38, Tr. 305–308).

Six of these speeches were delivered by Plant Superintendent Busby (P. A. 986, 990; 79–90, 268–269) who, in addition, frequently spent several hours a day in various departments suspected of being highly unionized (P. A. 990, 1003–1006; 276–279, 354, 380–381, 411–412, B. A. 87–90, 106–108, 110–111, 181–182, 189, 190–191, 278–279, 358), "running from one to another" of the employees and talking against joining the Union (P. A. 1005–1006; B. A. 87–90, 106–108, 158–166, 181–182, 189, 190–191, 193–

200, 208–209, 212–215).[6] Department Manager Flexman (P. A. 986; 456–457), in order "to make up their minds for them," called his employees to his office in a series of small groups and told them that the chief result of unionization would be less work for them and lay-offs during slack seasons (P. A. 1015; 462–464, B. A. 219–221, 224–228, 252–254, 281–284).

In the course of its counter-campaign, petitioner threatened to retaliate against employees for supporting the Union. Superintendent Busby, in November 1942, warned a known union-member employee that once he went on strike, he "was no longer an employee of Donnelley's" (P. A. 1009–1010; B. A. 162, 164–165). In March 1943, Department Manager Flexman warned Employee Caldwell that certain publicity concerning his union activities had made him a "marked man" and that he would probably not in the future receive the "responsibility" that he deserved (P. A. 1017; B. A. 239–240), but that he could "redeem" himself by resigning from his position on the Union Council (P. A. 1017; B. A. 245). Flexman cited the example of Foreman Anderson, who had recently been retired by petitioner on a pension, and said that petitioner "appreciated and rewarded loyalty in their employees" (P. A. 1017–1018; B. A. 240). During this same conversa-

[6] As a result of Superintendent Busby's conspicuous anti-union activities in the plant, the employees developed as a "password" among themselves the query, "Has Busby punched in yet?" (B. A. 197).

tion, Flexman, by contrast, asked Caldwell what he "thought of [Foreman] West and his union activities" and, when Caldwell said he thought West was "on the fence" with respect to the Union, Flexman said that he "had evidence to the contrary" and, because of that, he would have to put West "back on the bench," that is, demote him (P. A. 1072; B. A. 241).[7] At about this same time, Employee Dorn told Flexman that he had been invited to attend a Union meeting but before doing so wanted to know where he "stood" with the Company with respect to job security. Flexman told Dorn that "if you stick with the firm at this time you will be well taken care of" (P. A. 1018; B. A. 228–229, 233–234), and that he might attend the meeting, find out who belonged, and let Flexman know (P. A. 1018–1019; B. A. 230). Flexman then, again citing the contrasting examples of Foremen Anderson and West, said that Anderson had been "loyal" to petitioner (P. A. 1019; B. A. 231, P. A. 485, 486),[8] but that since West had joined the Union he was "no more use to us," was "creating an unhealthy atmosphere in the department," and that Flexman was "going to get rid of him" (P. A. 1072; B. A. 231).

The petitioner further interfered with, coerced, and restrained its employees in the exercise of their organizational rights by authorizing its foremen to

[7] Foreman West was discriminatorily demoted a month later (*infra*, pp. 16–19).

[8] The evidence shows that Flexman further stated that Foreman Anderson had fought against unionization and "was well taken care of for it" (B. A. 231, P. A. 485, 486).

combat the Union's organizing efforts and instructing its foremen, from 1937 until approximately the time of the hearing herein, as to petitioner's "anti-union philosophy and arguments" (P. A. 54, 1027–1030, 1034, 1035), and as to how they should represent to the employees the company's viewpoint with respect to the Act and the question of unions generally (P. A. 1027–1030; 272–275, 390–398, 400, 444–448, 458–460, 491–493, 602–603, 679–683, 688–689, 714–718, 725–727, 745–753, B. A. 10–12, 15–17, 26–30, 309). The foremen were told that they should gain the workers' "confidence" and then "explain" to them "that they were better off at Donnelley's without a union", that they would be "worse off if they join the union than they are now", that the foremen should "point out" to the employees that they would be "foolish" to join a union (P. A. 1029–1032; B. A. 15–17, 18–19, 32–33, P. A. 397), and that they should tell the employees to compare the "advantages" of working at Donnelley's and working in a union shop (P. A. 1028–1029; 273–275, 396, 683, 688–689, 704, 714, 727, 749–753).[9]

The foremen, accordingly, actively participated in petitioner's anti-union campaign. In 1939, when Flexman was a foreman (P. A. 1014; B. A. 222),[10]

[9] The evidence shows that the foremen were further instructed to tell the employees that they would make less money, suffer lay-offs, and "lose their annuities" under union conditions (B. A. 16–17, 18–19, 32–33, P. A. 397), and that petitioner would like to "keep things as they are now" (P. A. 752, B. A. 17).

[10] The Trial Examiner's Intermediate Report, as printed in the record (P. A. 1014), inadvertently states the date as 1937.

he asked Employee Dorn to persuade another employee to withdraw from the Union, and later "congratulated" Dorn upon the success of his mission (P. A. 1014; B. A. 222–224). Other foremen repeatedly told employees that they were a "bunch of damn fools", were "making a mistake", and "wouldn't get any place" by joining or supporting the Union (P. A. 1020, 1025; B. A. 65, 70, 81–82, 207–208), that they would be "suckers" to hand out money "for stuff like that" (P. A. 1021; B. A. 147–148, 151–152), that they had gone "union nuts" (P. A. 1024; B. A. 116), were "unpatriotic" (P. A. 996; 177–186, 689–692),[11] would not gain any benefit from unionizing Donnelley's but would lose benefits (P. A. 1021, 1022, 1024, 1025; B. A. 75, 81–82, 118, 120–121, 129, P. A. 662), and indeed were jeopardizing their jobs (P. A. 1024–1025; B. A. 129, 131–134, 112). The Union and its leaders were characterized by foremen, in conversations with employees, as "racketeers," "Dagos" and "no damned good," and as being primarily interested in getting "their fingers into your pockets" (P. A. 1020, 1022,

[11] The reference to patriotism was but a variation of statements by President Littell and Superintendent Busby, made to employees at various times in 1942, that unionism was a "European" "class system" foreign to American ways (P. A. 994–995; 78), that our soldiers were "fighting to defend democracy" and the right "to live * * * and work as we please, without paying dues" or "tribute" to anyone (P. A. 995; 78–79, 81, 83), and that the employees should "preserve for our boys in the service all of the things they are fighting for" (P. A. 995; 79, 81, 83, 418–419).

1024; B. A. 74–76, 196, 201).[12] One employee was urged to discourage others from joining the Union (P. A. 1024; 604–605).

In addition to the foregoing, petitioner's higher supervisors such as Superintendent Busby, Department Manager Flexman, and various department heads, engaged in extensive questioning of ordinary employees, as well as of foremen, between 1937 and 1943, concerning their union activities and the progress of the Union in organizing the employees (P. A. 1007–1010, 1017, 1019, 1020, 1023, 1031–1032, 1037–1038, 1071, 1072; B. A. 14–15, 18–19, 22–23, 59–62, 67–69, 105–107, 111, 161–163, 174, 184, 186, 213, 214, 230–232, 239–241, 284–285, P. A. 188, 596). And the foremen themselves embarked upon a program of wholesale questioning of employees concerning their union activities and the status of the Union in the plant (P. A. 1020–1023, 1025, 1031, 1037–1038; B. A. 74, 76–77, 84–85, 94–95, 100, 115, 116, 126, 138–139, 179–180, 187–188, 196–197, 206–207, 222, P. A. 661, 697, 739), which was encouraged not only by the conduct of Busby and other top supervisors described immediately above, but by Busby's action in receiving reports from the foremen containing information they had gathered (P. A. 1030–1031, 1039; 302, 366–367, 374–379, 380–381, 399–400, 402–403, 454–455, 619–620, 673, 677, 697–702, 736, B. A. 59–60). Information which was accumulated as a result of this program of inquiry was transmitted by Busby and other high-ranking supervisors to

[12] The record contains numerous similarly disparaging remarks by foremen (B. A. 86–87, 100–101, 141–142).

petitioner's executives (P. A. 54, 1038–1039; B. A. 528–529, P. A. 124–127, 251–256, 366–375, 380–381, 402–403, Tr. 2132–2134).[18]

Finally, petitioner sought further to intimidate its employees against organizing by repeatedly representing to them, not only that unionization would be futile, but that it would be detrimental to their interests. Petitioner asserted that it could not accept certain work if the employees were unionized because it could not "rely on the help" (P. A. 1008; B. A. 66, P. A. 335–336); that the Company would have less work for its employees because of higher production costs (P. A. 1006–1007, 1015; B. A. 161, 176, 184, 190, 192, 198, 201–202, 209–210, 227, P. A. 188, 189, 329–330, 483–484), would be compelled to abolish the minimum work-week (P. A. 1007, 1008, 1011; B. A. 86, 182, 184, 190, 192, 194, 210–211, 214, 230, 253, P. A. 86–87, 88, 91, 313, 330, 331, 487–488), would have to adopt the practice of laying off employees during slack periods (P. A. 1007, 1008, 1011; B. A. 146, 184, 190, 197–198, 201–202, 209–210, 227, P. A. 82, 84, 86–92, 192, 194, 314, 487–488), and intimated that petitioner might go bankrupt if the employees persisted in organizing (P. A. 1008; B. A. 209–211 P. A. 333–334). Similarly, petitioner represented that the payment

[18] Petitioner's executives received from Busby both written and oral reports with respect to union meetings held, how many Donnelley employees attended, and the nature of the business transacted at the meetings (P. A. 1037–1039; B. A. 528–529, P. A. 124–127, 370, Tr. 2132–2134).

of union dues was unnecessary and foolish (P. A. 993, 995, 1009; B. A. 67–68, 164, 185–186, P. A. 77–78), that workers who refused to join the Union would "reap the harvest" if the Union called a strike (P. A. 1015–1016; B. A. 220, 227–228, 284), that petitioner would never enter into a closed-shop agreement and that, since the Union always insisted upon a closed-shop, it was doubtful if petitioner and the Union could ever negotiate an agreement (P. A. 997–1000; 91–93, 315, 954–956, 959, 960, 961, B. A. 27, 163). On two occasions Superintendent Busby went further and asserted, in the presence of union-member employees, that petitioner would never negotiate with the Union (P. A. 1011–1012; 283–284, B. A. 506–507, Tr. 1186–1187).

On April 15, 1943, Walter West was summarily demoted from a supervisory position as foreman on the night shift to a non-supervisory position at a reduction in pay of $14.00 per week (P. A. 1073, 1079; B. A. 272–273). West had worked for petitioner for about nine years (P. A. 1065; B. A. 270–271). He had been a foreman since 1940 (P. A. 1065; 774). Petitioner recognized him as a highly competent and valuable employee and had consistently rewarded him for outstanding work (P. A. 1065–1066; B. A. 272–274, 386–388, 526–527, Tr. 1529). He received a salary increase as late as July 1942 (P. A. 1066; 198–200). In December 1942, West signed a Union authorization card (P. A. 1071; B. A. 287–288, 308–309). That same month

Department Manager Flexman questioned West as to the number of men under him who had joined the Union (P. A. 1071; B. A. 284–285), and warned him that Superintendent Busby felt that West had "too many union friends" and "was keeping bad company" (P. A. 1071; B. A. 285).

Sometime in February 1943, petitioner unsuccessfully tried to persuade West to accept a non-supervisory position on the day shift (P. A. 1072; B. A. 286–287). After West became a full fledged member of the Union in March 1943 (P. A. 1071; B. A. 308–309),[14] Department Manager Flexman openly declared to other employees that he was going to demote West because of his union activities (*supra*, p. 11) but would "wait until the opportunity presents itself" (P. A. 1072; B. A. 231, 241). Shortly thereafter, on April 1, 1943, Flexman was informed by an anonymous telephone call that West had been smoking in a film storage room in violation of a Company rule (P. A. 1073, 1075; B. A. 432–434, P. A. 864, 868). About a week later Flexman, upon Superintendent Busby's instructions, began gathering proof that West had thus violated the no-smoking rule (P. A. 1073; 860–861, B. A. 319, 322–323), which was by no means strictly observed (P. A. 1076, 1077, 1078; B. A. 306–307, P. A. 891–892, B. A. 294–303, 305–306, 334–342, 439–440). West was not consulted (P. A. 1073–1074; P. A. 862–

[14] The Intermediate Report of the Trial Examiner, as printed in the record (P. A. 1071), inadvertently states the date as March 1934.

863).[15] On April 15, Flexman reported the results of his investigation to petitioner's top officials, who thereupon instructed Flexman to obtain affidavits from the employees who had knowledge of West's smoking and then to demote West (P. A. 1073; B. A. 428–430), despite the fact that the usual punishment for such misconduct was a week's lay-off without pay (P. A. 1076, 1078; B. A. 306–307, P. A. 891–892). Flexman carried out his instructions accordingly, demoting West that very day, and mentioning the smoking incident to him then, for the first time (P. A. 1073–1074; 767–770, 861–863, B. A. 290). Later the same day, Flexman told an employee that West was a good worker but that the Company "could not have all that union agitation going on around here," and that the "next man would be a man of character that all the fellows would look up to" (P. A. 1079; B. A. 256–257).[16]

Upon the immediately foregoing facts, the Board concluded (P. A. 61, 1079), that West's violation of the no-smoking rule was merely a pretext[17] and that petitioner, in fact, demoted West primarily

[15] Employees who were questioned on the matter were asked not to mention the inquiries to West (B. A. 255, P. A. 862–863).

[16] Flexman admitted that he believed that the man who succeeded West as foreman was not in favor of the Union (B. A. 388–389, 468–469).

[17] The Board rejected, as unsupported by the evidence, petitioner's claim that West was delinquent, in other respects, in the performance of his duties as foreman (P. A. 1067–1071), and its claim that this alleged fact, in part, motivated petitioner in demoting West (P. A. 1071, 1079).

because of his union affiliation and activities, in violation of Section 8 (3) and (1) of the Act. Upon all of the evidence, the Board concluded, also (P. A. 50–56, 1039, 1097–1098), that petitioner had engaged in a course of conduct which interfered with, restrained, and coerced its employees in the exercise of their rights, in violation of Section 8 (1) of the Act.

On the basis of the foregoing findings, the Board ordered petitioner to cease and desist from its unfair labor practices, to offer reinstatement with back pay to Walter West, and to post appropriate notices (P. A. 61–63b).

Petitioner filed in the court below a petition to review and set aside the Board's order (P. A. 1–43). The Board answered, requesting enforcement of its order (P. A. 44–49), and, on June 12, 1946, the court handed down its opinion enforcing the Board's order in full (B. A. 532–542). On August 12, 1946, the court denied a petition for rehearing (B. A. 575), filed by petitioner (B. A. 544–570), and on September 11, 1946, the court entered a decree in conformity with its opinion (B. A. 575–579).

ARGUMENT

1. No question of general importance is presented by petitioner's contention (Pet. 6–9, 24–25) that evidence is lacking to support the Board's findings, sustained by the court below, that petitioner interfered with, restrained, and coerced its employees, and discriminatorily demoted West. The Board

found that petitioner, through Plant Superintendent Busby and Department Manager Flexman, threatened employees that petitioner would retaliate against them if they supported the Union, that an employee who went on strike would lose his job, and that activity in behalf of the Union would not only prevent an employee from receiving otherwise deserved recognition, but would result in the penalty of demotion (*supra*, pp. 9–12). That such direct threats of economic reprisal against employees for exercising their right of self-organization constitute, in themselves, violations of Section 8 (1) of the Act is, of course, not open to question.[19] The court below in this case (P. A. 533–539) and courts uniformly have so held, and petitioner may not avoid responsibility for its conduct by labelling the threats of its high officials as "personal conversation" (Pet. 19–22).

The Board further concluded that petitioner's course of conduct in opposition to the Union was properly viewable only as a whole, and against the background of petitioner's notorious anti-union policy prior to the advent of the Act, a policy the implementation of which petitioner subsequently modified but never abandoned. The Board's conclusion was justified. Even apart from the outright threats of retaliation against employees, peti-

[19] The Board found (P. A. 55) that petitioner's threats to its employees constituted unlawful conduct, in themselves, without regard to the balance of petitioner's entire course of conduct.

tioner's unremitting campaign against the Union was characterized by acts which have become accepted evidence of unlawful interference and coercion. Misleading statements as to employees' rights under the Act,[19] statements that organizing activities by employees are unpatriotic,[20] statements disparaging a union or its leaders,[21] warnings as to the loss of jobs and job benefits if employees organize[22] and as to the general futility of employees' exercis-

[19] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 339; *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. 2d 589, 591 (C. C. A. 7).

[20] *National Labor Relations Board* v. *Eclipse Moulded Products Co.*, 126 F. 2d 576, 580 (C. C. A. 7); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. 2d 714, 716 (C. C. A. 4), certiorari denied, 320 U. S. 738; *National Labor Relations Board* v. *Condenser Corp. of America*, 128 F. 2d 67, 81 (C. C. A. 3); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2).

[21] *Humble Oil Co.* v. *National Labor Relations Board*, 140 F. 2d 777, 778 (C. C. A. 5); *National Labor Relations Board* v. *Aintree Corp.*, 132 F. 2d 469, 471 (C. C. A. 7), certiorari denied, 318 U. S. 774; *National Labor Relations Board* v. *Reeves Rubber Co.*, 153 F. 2d 340, 341 (C. C. A. 9); *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 669 (C. C. A. 10), certiorari denied, 323 U. S. 752.

[22] *National Labor Relations Board* v. *Brezner Tanning Co.*, 141 F. 2d 62, 63 (C. C. A. 1); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C. C. A. 2); *Big Lake Oil Co.* v. *National Labor Relations Board*, 146 F. 2d 967, 969 (C. C. A. 5); *National Labor Relations Board* v. *American Pearl Button Co.*, 149 F. 2d 311, 314–315 (C. C. A. 8); *National Labor Relations Board* v. *Litchfield Mfg. Co.*, 154 F. 2d 739, 741 (C. C. A. 8); *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668, 669 (C. C. A. 10), certiorari denied, 323 U. S. 752.

ing their statutory right to organize,[23] as well as surveillance and questioning of employees with respect to their union activities,[24] are well-recognized forms of interference, restraint and coercion, in violation of Section 8 (1) of the Act.

And, in the instant case, the nature of petitioner's elaborate and deliberate campaign to defeat the Union, we submit, heightened the coercive effect of its conduct. For example, petitioner's use of its foremen as anti-union agents demonstrated a glaring contempt for the statutory guarantee of the employees' freedom of action in matters relating to organization, and resulted in the severest pressure being brought against the employees. Petitioner's contention that it is not responsible for the coercive conduct of its foremen because the foremen themselves were as eligible for membership in the Union as were the rank and file workers (Pet. 26–29) is

[23] *National Labor Relations Board* v. *Moench Tanning Co., Inc.*, 121 F. 2d 951, 952 (C. C. A. 2); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 649 (App. D. C.); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813 (C. C. A. 7); *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761, 762 (C. C. A. 7); *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. 2d 588, 589–590 (C. C. A. 8). Cf. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 385.

[24] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 535; *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 455 (C. C. A. 4); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813–814 (C. C. A. 7); *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570, 577 (C. C. A. 10), certiorari denied, No. 375, this Term.

manifestly without merit. Sustaining the Board's rejection of this contention (P. A. 53–54, 1026–1036), the court below properly held (B. A. 538) that when "petitioner sent [the foremen] * * * out on missions of anti-unionism, the petitioner became responsible for what they said and did. The foremen were then speaking for their employer as its representatives, and the petitioner was liable for what they said and did within the scope or apparent scope of their authority. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80 * * * *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514 * * * *National Labor Relations Board* v. *Fitzpatrick & Weller, Inc.*, 138 F. 2d 697, 698. The rank and file of petitioner's employees had a right to assume that the foremen spoke for the petitioner, especially in the light of petitioner's long standing antagonism to unions * * *."

Similarly, petitioner's extensive questioning and surveillance of its employees with respect to union matters, which embraced the gathering of information and the reporting of it to petitioner, represents a flagrant transgression upon its employees' right to freedom of organization, which formed an integral part of petitioner's anti-union program and entailed the services of petitioner's highest officials as well as its foremen. Petitioner cannot escape responsibility for its conduct in this respect by the simple contention that its questioning and surveillance was not developed into a *formal* system of

inquiry and report (Pet. 31–35),[25] or that the information obtained was never "used" (Pet. 33, 34–35).[26] And regardless of whether, as petitioner contends (Pet. 12, 17, 33), questioning of employees concerning their union activities constitutes, in itself, an unfair labor practice, there can be no doubt but that the questioning in which petitioner engaged, occurring, as it did, in a context of coercive anti-union pressure otherwise exerted upon the employees, constituted part of petitioner's course of unlawful interference, restraint, and coercion. See cases cited, *supra*, p. 22, n. 24.

Nor does the case involve, as petitioner contends (Pet. 7–8, 11–14, 18–19, 24–25), the issue of free speech under the First Amendment. The facts set forth (*supra*, pp. 3–19) show that the Board was fully justified in concluding that petitioner's whole course of conduct constituted interference, restraint, and coercion. Such conduct is not constitutionally privileged merely because it involves the use of oral and written statements. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477–478. Where, as here, the employer's statements are either inherently coercive, or exert a coercive force by reason of the "whole

[25] See *National Labor Relations Board* v. *Standard Oil Co.*, 124 F. 2d 895, 908 (C. C. A. 10).

[26] *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813, 814 (C. C. A. 7); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 647 (App. D. C.); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C. C. A. 3).

complex" of the employer's anti-union activities, no question of free speech under the First Amendment is involved. The *Virginia Electric & Power* case, *supra; Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 538–539; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 386; *National Labor Relations Board* v. *American Laundry Machinery Co.,* 152 F. 2d 400, 401 (C. C. A. 2); *National Labor Relations Board* v. *M. E. Blatt Co.,* 143 F. 2d 268, 273–275 (C. C. A. 3), certiorari denied, 323 U. S. 774; *National Labor Relation Board* v. *Peterson* (C. C. A. 6), decided October 16, 1946; *Reliance Mfg. Co.* v. *National Labor Relations Board,* 143 F. 2d 761, 763 (C. C. A. 7).

2. Petitioner contends, principally upon evidentiary grounds (Pet. 6–9, 11–35), that the Board improperly ordered it to cease and desist (a) from questioning and haranguing its employees concerning their union activities, (b) from maintaining a system of reports on union activities in the plant, and (c) from instructing foremen and supervisors to make statements to its employees concerning labor organizations which transgress the provisions of the Act.

We have already shown (*supra,* pp. 11–15) that there was substantial evidence supporting the Board's findings that petitioner's persistent questioning of its employees concerning their union activities, maintaining reports on their union activities, and instructing and authorizing foremen and

supervisors to join in petitioner's anti-union campaign, constituted part of petitioner's whole course of unlawful interference and coercion. Insofar as petitioner's attack upon the Board's order is based upon a claim of lack of substantial evidence supporting the subsidiary findings upon which the order is based, therefore, it must fail.

The only other respect in which petitioner challenges the Board's order is that the provision restraining petitioner from instructing its foremen to engage in unlawful anti-union conduct is invalid because uncertain (Pet. 30–31). This provision of the order, as the statement of facts shows (*supra*, pp. 12–14), is also nothing more than a specification of part of the course of unlawful conduct petitioner has engaged in in the past, and from which it is enjoined in the future. Its inclusion in the order does not add to the prohibitions of the broad cease and desist clause (Par. 1 (c) of the order; P. A. 62),[27] to which petitioner does not object except upon evidentiary grounds (Pet. 8). It thus renders the Board's order, generally, more specific and definitive, and not less so, as petitioner contends. This provision of the order, therefore, is entirely proper.

CONCLUSION

The decision below is correct and there is neither a conflict of decisions nor any question of general

[27] Paragraph 1 (c) of the order, through a typographical error, appears as the second paragraph designated "1 (b)" in the printed record (P. A. 63).

importance. The petition for a writ of certiorari should, therefore, be denied.

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JANUARY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

SEC. 10. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

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